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63848—27

In the Supreme Court of the United States

OCTOBER TERM, 1927

No. 219

D. B. HEINER, COLLECTOR OF INTERNAL REVENUE, for the Twenty-third District of Pennsylvania, Petitioner

v.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE Will of Glenn T. Braden, deceased

---

No. 220

C. G. LEWELLYN, FORMER COLLECTOR OF INTERNAL Revenue for the Twenty-third District of Pennsylvania, Petitioner

v.

THE COLONIAL TRUST COMPANY, EXECUTOR OF THE Will of Glenn T. Braden, deceased

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BRIEF ON BEHALF OF PETITIONERS

OPINIONS OF THE COURT BELOW

The District Court rendered an opinion (R. 41–47) which is reported in 12 F. (2d) 481. The opinion of the Circuit Court of Appeals (R. 50–51) is found in 17 F. (2d) 36.

JURISDICTION

The judgments to be reviewed were rendered on January 11, 1927. (R. 52.) Petition for certiorari was filed April 8, 1927, and granted May 16, 1927 (R. 53), pursuant to Section 240, Judicial Code, as amended by the Act of February 13, 1925.

QUESTION PRESENTED

The question is whether, under the Revenue Act of 1916 and the subsequent Revenue Acts down to and including that of 1921, income derived from the sale of oil extracted from Osage Indians' tribal lands by a non-Indian operating lessee is exempted from taxation.

THE STATUTES

Section 1 (a) of the Revenue Act of 1916 (c. 463, 39 Stat. 756) provides:

> That there shall be levied, assessed, collected, and paid annually upon the entire net income received in the preceding calendar year from all sources by every individual, a citizen or resident of the United States, a tax * * * [here follow the rates].

Section 2 (a) of the Revenue Act of 1916, as amended by the Act of 1917 (c. 63, 40 Stat. 300, 329), defines income as follows:

> That, subject only to such exemptions and deductions as are hereinafter allowed, the net income of a taxable person shall include gains, profits, and income, derived from salaries, wages, or compensation for personal service of whatever kind and in

> whatever form paid, or from professions, vocations, businesses, trade, commerce, or sales, or dealings in property, whether real or personal, growing out of the ownership or use of or interest in real or personal property, also from interest, rent, dividends, securities, or the transaction of any business carried on for gain or profit, or gains or profits and income derived from any source whatever.

The pertinent sections of the later applicable Revenue Acts and definitions of gross and net income are not substantially different from those above quoted and are not here set out in full. They are Act of February 24, 1919, c. 18, 40 Stat. 1057, 1062, 1065, Sections 210, 213; Act of November 23, 1921, c. 136, 42 Stat. 227, 233, 237, Sections 210, 213.

STATEMENT OF THE FACTS

The facts are not in dispute and the case was tried to the court on a stipulation of facts. (R. 16.)

In the court below the record was not printed in the *Lewellyn case,* because of a stipulation that it would abide the outcome of the *Heiner case.* (R. 47, 48, 49.)

Prior to 1917 (R. 6) Glenn T. Braden, a white citizen of the United States, procured an oil lease from the Tribal Council of the Osage Tribe of Indians in Oklahoma covering a portion of the lands of said tribe in that State. This lease was on a form prescribed by the Secretary of the Interior, was approved by that officer as required by law,

and was made subject to lawful rules and regulations then in force or thereafter promulgated by the Secretary of the Interior. Braden as lessee agreed to pay the Superintendent of the Osage Indian Agency for the lessor, as royalty, the sum of 16⅔% of the gross proceeds from the sale of oil produced by him, or 20% if the quantity of oil taken from oil-producing wells on any quarter section during any calendar month exceeded 100 barrels per well per day. (R. 6, 7.)

As a result of his development of the land thus leased, Braden, during the period from 1917 to 1921, inclusive, produced oil therefrom in large quantities. From the sale of his part of the oil he derived income. He included this income yearly in his returns for 1917 to 1921, inclusive, and paid taxes thereon to Collector Lewellyn. In 1924, on an audit of his returns, some additional taxes aggregating, without interest, $352,991.52 (R. 10–13) were assessed and paid under protest to Heiner, then Collector. The claim for refunds, on the ground that the oil income was exempt, was first made in 1924. (R. 11.) The total amount of tax paid by Braden as the result of his including the oil income in his returns was much more than the additional taxes assessed in 1924, so recovery is sought of all the additional taxes assessed in 1924 and paid to Collector Heiner, and also of large sums paid by the taxpayer to Collector Lewellyn in 1918 to 1922 as taxes resulting from the inclusion in his returns for the years 1917 to 1921 of the income derived

from the oil lease. As the record in the *Lewellyn case* is not printed, we have only the figures for the additional amounts paid Heiner. These, with interest, amounted to $411,127.07, for which the District Court rendered judgment. (R. 1.)

Braden died on September 23, 1923 (R. 3), and his executor, the respondent, on April 4, 1925, filed two suits against the respective collectors to whom the above tax had been paid for the recovery thereof. Judgment for the plaintiff in each case was rendered by the District Court, and these judgments were affirmed by the Circuit Court of Appeals for the Third Circuit.

SPECIFICATION OF ERROR TO BE URGED

The court erred in holding that the income of a non-Indian operating lessee of Osage Indian tribal lands, derived from the sale of oil extracted therefrom was exempt from taxation under the Federal Revenue Acts.

SUMMARY OF ARGUMENT

Congress had power to tax the lessee's income, and the question is one of intention and statutory construction.

The Revenue Acts clearly tax all income of every individual and gain derived from any source whatever, subject only to the exemptions specified in the statutes. No exemption of income of lessees of Indian oil lands is found in the Acts, and none should be implied.

It does not follow from the fact that a State could not tax this income that Congress intended to exempt it.

The argument that exemption of the lessee's profits might result in larger royalties is no reason for writing an exemption into the statute by judicial legislation.

ARGUMENT

CONGRESS HAD POWER TO TAX THE INCOME DERIVED BY THE LESSEE OF INDIAN OIL LANDS FROM THE OPERATION OF HIS LEASES.—THE TAX IS IMPOSED BY THE PLAIN TERMS OF THE REVENUE ACTS, AND NO EXEMPTION SHOULD BE IMPLIED

That Congress had power to tax the income of the lessee is conceded. The question is whether it intended to exercise that power.

The Revenue Act of 1916 imposed the tax upon the "entire net income received * * * from all sources by every individual a citizen or resident of the United States," and provided that, "subject only to such exemptions and deductions as are hereafter allowed," the net taxable income should include gains from "the transaction of any business carried on for gain or profit" and gains "derived from any source whatever."

There is no suggestion among the expressed exemptions of an exemption of the income derived by a lessee of Indian oil lands from the operation of his lease.

The later Revenue Acts are substantially the same.

This language is clear and explicit. Unless the income in question is to be exempted by implication, it was taxed.

The first suggestion offered by the respondent is that the lessee was an agency of the United States, and that his income from these leases was beyond the taxing power of the State, and therefore it should be concluded that Congress did not intend to tax it. It is settled that the State had no power to tax such income.

> *Gillespie* v. *Oklahoma*, 257 U. S. 501;
> *Choctaw & Gulf R. R. Co.* v. *Harrison*, 235 U. S. 292;
> *Indian Oil Co.* v. *Oklahoma*, 240 U. S. 522;
> *Howard* v. *The Oil Co.*, 247 U. S. 503;
> *Jaybird Mining Co.* v. *Weir*, 271 U. S. 609.

The last case cited said (p. 614):

> * * * In each of these cases the tax was condemned as an attempt to tax an instrumentality used by the United States in fulfilling its duties to the Indians.

But it does not necessarily follow that Congress intends to exempt from Federal taxation what the States have no power to tax. On the contrary, a different policy has been pursued by Congress in respect of many subjects, such as compensation of Federal officers which it has intended to and does tax.

Merely because the States have no power to tax such income is no reason why Congress should be held to have intended to exempt it, when it has used language plainly including it in taxable income.

The other argument of the respondent is that the reasons given in the decisions of this Court holding the States without power to tax such income and in the opinions of the Attorney General holding that the income of the Indians themselves is not within the revenue laws lead to the conclusion that Congress intended to exempt this income.

In 34 Op. A. G. 275, March 15, 1924, the Attorney General held that the income of members of the Five Civilized Tribes from lands allotted in severalty, the alienation of which was restricted and which the United States had agreed with the Indians should be tax exempt while restricted, was not intended to be taxed.

In 34 Op. A. G. 439, March 20, 1925, the Attorney General held that the income derived by the Quapaw Indians from their restricted allotments were not intended to be taxed under the Revenue Acts because of the settled rule that general Acts of Congress are not ordinarily construed to apply to Indians, and also because Congress had by other statutes disclosed an intention that the allotments should be exempt from all taxes while restricted.

Neither of these opinions nor the decisions of this Court above cited require or support the decision below.

This tax is not on the Indians, their property, or income. It is on the income of those dealing with the Indians.

The theory of the respondent is that the taxation of the income of the lessees of Indian oil lands throws a burden on the Indians, because if the lessee were exempt, he would probably take that into account in negotiating the lease and offer a higher royalty. This is altogether theoretical and not practical. Certainly those who have heretofore obtained Indian oil leases have not fixed the amount of their rents or royalties with any such considerations in mind. The Treasury has from from the beginning consistently treated such income as taxable. Prior to the decision of the District Court in this case, December 31, 1925, no court had held such income exempt. In such circumstances, and considering the plain, all-inclusive language of the statutes, with no suggestion in them of an exemption, it is inconceivable that the respondent's decedent increased the royalty in reliance on the exemption.

It is not apparent how, at the time of making any such lease, the lessee could predict future tax rates with sufficient confidence to affect his offer of royalties.

The record in this case (R. 13, 11, 10) shows that the taxpayer, after his lease was made, "in ignorance of his legal rights," included such income

in his returns for 1917, 1918, 1919, and 1920 and made no claim for refund until 1924.

There must be some practical limit to implied exemptions in favor of the Indians, and that limit is passed when there is read into the Revenue Acts exemptions of the income of those who make profit from dealings with the Indians.

The case of *Gillespie* v. *Oklahoma, supra,* was urged upon this Court to support the claim that the income of consulting engineers of a State or municipality, in so far as it resulted from that service, was beyond the Federal taxing power, because to tax it increased the cost of operation of the municipality, but the argument was rejected. (*Metcalf & Eddy* v. *Mitchell,* 269 U. S. 514.)

That the Indians are wards of the United States is not a persuasive reason for exempting from taxation the income of those who make profit by dealing with them.

But whatever argument may be made in favor of the propriety of such an exemption, Congress has not yielded to it.

Besides the clear terms of the statutes referred to, we have their successive reenactment.

The Treasury Department has collected consistently and for years income taxes on the income of operating lessees of Indian oil lands. In connection with the petition for certiorari in this case it advised that such taxes, aggregating more than

$150,000,000, had been collected under the various Revenue Acts. Such an item is too large to have been overlooked. The enormous income which has been derived by Indians in Oklahoma and their lessees from oil lands has attracted wide attention. If Congress had been dissatisfied in 1917, in 1919, in 1921, in 1924, in 1926, when enacting Revenue laws, with the imposition of income taxes on and the collection of vast sums in such taxes from lessees of Indian oil lands, that dissatisfaction would have been reflected in a provision expressly exempting such income.

The reenactment of the all-inclusive language of these successive Revenue Acts with the reiteration of the provision that the taxes are subject only to the exemptions set forth in the statute is a legislative acceptance and approval of the interpretation of the Treasury Department.

As to exemptions from taxation it has been said:

> * * * There must be no doubt or ambiguity in the language used upon which the claim to exemption is founded. It has been said that a well founded doubt is fatal to the claim; no implication will be indulged in for the purpose of construing the language used as giving the claim for exemption, where such claim is not founded upon the plain and clearly expressed intention of the taxing power. [*Bank of Commerce* v. *Tennessee*, 161 U. S. 134, 146.]

Here there is no provision in the statute on which the claim for exemption is based, and the court below has read one into it.

The judgment should be reversed.

Respectfully submitted.

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SEPTEMBER, 1927.

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